



Written by [Bob Adelman](#) on January 14, 2016

TransCanada Sues Obama for Exceeding his Authority in Rejecting Keystone

When TransCanada [filed its two lawsuits](#) on January 6, company spokesman Mark Cooper said, “TransCanada has undertaken a careful evaluation of the [Obama] Administration’s action and believe there has been a clear violation of NAFTA, and the U.S. Constitution, in these circumstances.”

In the federal lawsuit, filed in Texas, TransCanada is seeking to limit presidential powers to prohibit future presidents from unilaterally rejecting such projects based on how the United States might be perceived by the international community.



Environmentalists want to leave untapped oil reserves in the ground and fought successfully over the past seven years to have the president finally reject the project altogether last November. TransCanada wants to complete the Keystone XL pipeline in order to bring crude from Canada through Montana and South Dakota to Nebraska, where it would connect with existing pipelines. If and when completed, the pipeline complex would carry more than 800,000 barrels of crude every day to refineries along the Gulf Coast.

TransCanada hasn’t been idle during the last seven years and is working on completing its Energy East project to bring its crude to Canadian refineries on the east coast. Although meeting with environmental resistance there, the green movement in the United States has been stymied because that development lies entirely on Canadian lands.

When word got out that TransCanada’s lawsuit was based upon Obama’s alleged violation of the U.S. Constitution rather than on environmental or procedural grounds, some constitutional lawyers concluded that it was a lost cause. James Rubin, an environmental lawyer with Dorsey & Whitney, a Minneapolis law firm, said the company’s suit would be “challenging” and that courts have considered “cross-border” pipeline decisions before and have generally found them to be within the president’s power to accept or reject. Ayesha Rascoe, writing for Reuters, concluded the same thing: “Courts in those cases have generally said the permitting process falls under the president’s Constitutional authority to conduct foreign policy.” However, Alan Dunn, a former U.S. assistant secretary of commerce, called it “novel and intriguing.”

TransCanada responded in a letter published in the *Wall Street Journal* on Wednesday written by the company’s general counsel, Kristine Delkus. She claimed that Obama’s rejection in November was “misplaced symbolism [which was] chosen over merit and science — rhetoric won out over reason.”

She claimed that historically most “cross-border” decisions have taken two years or less and only involved one or two government agencies, while Keystone’s took seven and involved eight agencies before being rejected.



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In its rejection, wrote Delkus:

The Obama administration's decision to deny the pipeline explicitly acknowledged that building it would benefit the U.S. economy, create jobs, increase energy security, advance relations with Canada, not harm the environment and cause no significant increase in greenhouse-gas production....

But environmental activists made rejection of the project a litmus test of the president's climate-change credentials. The State Department's official Record of Decision reasoned that permitting the pipeline to proceed would "undermine U.S. climate leadership" because "the understanding of the international community" — contrary to the administration's own findings — was that the pipeline would increase greenhouse-gas emissions. Permitting construction would "undercut the credibility and influence of the United States" in negotiating with other countries, including at the coming Paris climate conference.

In other words, environmentalism won out over reason and history. She pointed out that using those concerns as the basis for rejecting Keystone is not allowed under the U.S. Constitution: "The president can exercise only powers granted by a statute or the Constitution. The administration acknowledged that no statute supports its action. Nor does the Constitution." (In actuality, of course, statutes must also be based on the enumerated powers of the Constitution, since Congress may not enact any law it chooses but may only enact those laws that are constitutional.)

She added:

No president before has prohibited construction of a major infrastructure project affecting such extensive domestic and international commerce. Nor has any president ever claimed the power to block cross-border trade [in order] to enhance his negotiating power abroad.

If her company's lawsuit fails and the Keystone rejection is allowed to stand, she wrote that it will "call into question the entire process for cross-border facility approvals. It strongly suggests that investing in the U.S. is subject to a level of 'sovereign risk' usually associated with far less developed countries."

Richard Grimmett, a specialist in such matters working at the U.S. State Department, wrote in 1999 that the issue is far more complex than that suggested by Delkus: "The United States Constitution divides foreign policy powers between the President and the Congress so that both share in the making of foreign policy ... making foreign policy is a complex process and ... the support of both branches is required for a strong and effective U.S. foreign policy."

After reviewing the NAFTA lawsuit, the *Washington Post* concluded that TransCanada's case is so strong that the Obama administration just might lose. Such a decision would cost the U.S. taxpayer \$15 billion, the amount sought by TransCanada to recoup its losses in promoting the project over the last seven years as well as losses of potential profits had the project been allowed to be completed.

With most Republican candidates supporting the Keystone XL pipeline project, there is the chance that the decision could be reversed in the event that a Republican wins the presidential election. With Republican majorities in both the House and the Senate (far from certain), that "complex process" could be simplified, at least in the case of Keystone.

One benefit emanating from the lawsuit is increased conversation about just how much power and authority the president has to act on his own, just in time not only for the anticipated "[audacious executive actions](#)" [promised by Obama's chief of staff](#) but also in time for the presidential election.



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A graduate of an Ivy League school and a former investment advisor, Bob is a regular contributor to The New American magazine and blogs frequently at [LightFromTheRight.com](#), primarily on economics and politics. He can be reached at badelman@thenewamerican.com



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